89-1728

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESTERN FUELS-UTAH, INC.,

Petitioner,

v.

MANUEL LUJAN, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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Dated: May 8, 1990

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QUESTIONS PRESENTED

A. Whether the Secretary of Interior waives the United States' right to adjust the terms of a federal coal lease "at the end" of the initial twenty year period, as authorized by the lease and by the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 207 (1971), when he fails to decide on the new terms and to communicate those terms to the lessee by the end of that period?

B. Whether the Court below improperly applied the *Chevron* rule (*Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)) in deferring to the Secretary of Interior's interpretation of his statutory authority to readjust a federal coal lease?

PARTIES

The following parties appeared in the cases consolidated for decision in the court below:

1. Western Fuels-Utah, Inc.[1]

2. Manuel Lujan, Secretary, United States Department of the Interior.

3. (a) Peabody Coal Company.

   (b) Powder River Coal Company.

   (c) North Antelope Coal Company.

4. Colowyo Coal Company.

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[1] Western Fuels-Utah, Inc. is a Wyoming corporation that is wholly owned by Western Fuels Association, Inc., a Wyoming non-stock, not-for-profit fuel supply cooperative, and Deseret Generation and Transmission Corporation, a rural electric cooperative headquartered in Utah. Neither Western Fuels-Utah, Western Fuels Association nor Deseret has any publicly owned parent, subsidiary or affiliate entities.

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PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1-1a) is reported at 895 F.2d 780 (1990). The unreported decision of the United States District Court for the District of Columbia appears in the appendix (App. 1-23a). The decision of the Interior Board of Land Appeals, United States Department of the Interior ("IBLA"), is reported at 98 IBLA 114 (1987).

II. JURISDICTION

The decision of the United States Court of Appeals was rendered and judgment entered on February 9, 1990. No petition for rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. APPLICABLE STATUTE AND REGULATION

At the time the United States issued a coal lease to the predecessor in interest of Western Fuels-Utah, Inc. ("Western-Utah"), the Mineral Lands Leasing Act provided (in language unchanged from its inception in 1920) that as to coal:

> Leases shall be for indeterminate periods upon condition * * * that *at the end* of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods.

Mineral Lands Leasing Act 1920, § 7, 41 Stat. 439, 30 U.S.C. § 207 (1971) (Emphasis added). The applicable Department of Interior regulation at the time of the proposed readjustment provided that:

> (c)(1) The authorized officer shall, prior to the expiration of the current or initial 20-year period or any succeeding 10-year period thereafter, notify the lessee of any lease which becomes subject to readjustment after June 1, 1980, whether any readjustment of terms and conditions will be made prior to the expiration of the initial 20-year period or any succeeding 10-year period thereafter. On

> such a lease the failure to so notify the lessee shall mean that the United States is waiving its right to readjust the lease for the readjustment period in question.
>
> (2) In any notification that a lease will be readjusted under this subsection, the authorized officer shall prescribe when the notice of readjusted lease terms shall be transmitted to the lessee. This time shall be as soon as possible after notice that the lease shall be readjusted, but shall not be longer than 2 years after such notice. Failure to transmit the notice of readjusted lease terms in the specified period shall constitute a waiver of the right to readjust, unless the delay is caused by events beyond the control of the Department.

43 C.F.R. § 3451(c) (1983).

IV. STATEMENT OF THE CASE

The facts pertinent to Western-Utah's argument are undisputed. Western Fuels Association, Inc., and Deseret Generation and Transmission Cooperative formed Western-Utah in order to develop and operate the underground Deserado Mine, located near Rangely, Colorado, and thus to supply coal to the Bonanza Power Plant, a 400 megawatt electric generating station owned and operated by Deseret. The mine is in Northwestern Colorado. The Bonanza Power Plant is located 30 miles west of the mine, near Vernal, Utah.

The Secretary of the Interior is responsible for the administration of the federal coal leasing system un-

der the Mineral Lands Leasing Act, 30 U.S.C. § 181 *et seq* ("MLLA"). Secretary Lujan has supervisory authority over the Bureau of Land Management ("BLM"), which administers federal coal leases issued under the MLLA. BLM issues and administers hundreds of federal coal leases, including the adjustment of their terms.[2] The Secretary of the Interior also has supervisory authority over the IBLA, which has delegated authority to render final decisions for the Secretary on appeals from BLM decisions. *See* 43 C.F.R. § 4.1.

The lease involved in this proceeding is Coal lease No. C-023703, issued by BLM on March 1, 1963, to a predecessor in interest of Western-Utah. The coal reserves covered by Lease C-023703 are mined by underground methods. The lease is one of six federal coal leases comprising Western-Utah's Deserado Mine.

Lease C-023703 (the "1963 Lease") was issued pursuant to Section 7 of the MLLA. Section 7, prior to its amendment in 1976, stipulated that coal leases were to be of indeterminate term (terminable under conditions not relevant here), on condition that the Secretary could readjust the terms and conditions "*at the end* of each twenty-year period succeeding the date of the lease." 30 U.S.C. § 207 (1971) (emphasis added).[3] The 1963 Lease, following the applicable statute, "reserved" in the Secretary:

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[2] BLM currently administers approximately 297 underground coal leases, of which approximately 36 are due for readjustments in the near future.

[3] The 1920 Mineral Lands Leasing Act was amended by the Federal Coal Leasing Amendments Act of 1976, Pub. L. No. 94-377, 90 Stat. 1083. Among other changes, the 1976 Act re-

> [T]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof . . .

The lease, having been issued on March 1, 1963, thus allowed for an initial adjustment of its terms and conditions "at the end of 20 years," or until February 28, 1983, with new terms to become effective on March 1, 1983.

The 1963 Lease carried an annual per acre rental of 25 cents for the first year, 50 cents for the second through fifth years, and $1.00 for each year thereafter. The royalty rate was set at 15 cents per ton of coal mined.

As the time neared for BLM either to readjust Western-Utah's 1963 Lease or to lose its right to change the lease terms, BLM sent Western-Utah a notice. The notice, dated May 17, 1982, and received by Western-Utah on May 20, 1982, was a verbatim copy of the form notice set forth in part 3451 of the

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designated section 7 as section 7(a) and retained the "at the end of" deadline for readjustment. Leases remain of indeterminate term. The initial readjustment period remains "at the end of" the first twenty years of the lease (designated by the amendment as the "primary term"). Subsequent readjustments are authorized "at the end" of each ten year period thereafter. The 1976 Act's amendments to section 7 also required the Secretary henceforth to set royalty rates on coal at 12½ per cent of value for surface mines but permitted royalties of a "lesser amount" for underground mines. *See* 30 U.S.C. § 207(a) (1986). The lease at issue here is an underground mine. Western-Utah does not challenge the applicability of the amended section 7 to its lease from and after the expiration of the first twenty-year period.

BLM Manual. It recited only that the 1963 Lease would be readjusted, pursuant to the regulations, and that another notice, "containing the readjusted terms and conditions," would be sent to Western-Utah on or before May 17, *1984*, more than a year beyond the end of the initial 20 year period. The May 1982 Notice did not say a word about what the new lease terms or conditions might be.

BLM, following its normal procedure, began working on Western-Utah's lease after it sent out the May 1982 notice. It is undisputed that the government's personnel themselves did *not* consider the 1982 "notice" to Western-Utah to be the actual lease readjustment, nor did the government's personnel regard that "notice" as a statement of what the readjusted terms and conditions would be. The Secretary's representatives, *after* sending the notice, still assumed that the adjustment needed to take place on or before March 1, 1983.

The BLM has not acted consistently in deciding when it is necessary to effect these kinds of readjustments in coal leases. In the vast majority of cases, BLM transmits the adjusted terms and conditions to the lessee before the end of the current 20-year period so that the lessee knows what the new terms are that become effective at the end of that period. Nevertheless, the Secretary's regulation asserts only that, prior to the expiration of the current 20-year period, the lessee shall be sent a notice of the intent to readjust the terms and conditions. This notice is to inform the lessee that the actual new terms and conditions will be transmitted no later than two years after the initial notice. 43 C.F.R. § 3451(c)(1) and (2).

Unlike BLM's usual practice, in Western-Utah's case BLM did not notify Western-Utah of the actual, proposed readjusted terms for Lease C-023703 until it sent a notice to that effect dated May 3, 1983, two months and three days after the end of the twenty year period. Western-Utah received the notice on May 16, 1983. This *second* notice to Western-Utah, sent *after* BLM had done its internal work on the lease and *after* the Minerals Management Service had made its recommendations on lease terms, included a substitute form of Lease No. C-023703, setting out the new rental and royalty terms and other changes. Western-Utah knew, at that point and *not earlier*, that BLM proposed increases in the annual rental rate from $1.00 per acre to $3.00 per acre. Western-Utah knew, at that point and *not earlier*, that BLM wanted to raise the royalty from 15 cents per ton to 8% for coal from underground mines. Western-Utah knew, at that point and *not earlier*, that BLM would not go lower than an 8% royalty for the underground Deserado mine, even though both the statute and BLM's regulations authorize royalties of less than 8% for "underground mining operations." 30 U.S.C. § 207(a); 43 C.F.R. § 3473.3-2(a).

The Secretary, as noted above, obviously sent the readjusted terms more than two months after the adjustment deadline. The readjusted terms now cost Western-Utah, Deseret and electric consumers in the West additional millions of dollars each year.[4]

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[4] Western-Utah mined 1,191,222 tons of coal from Lease No. C-023703 in 1989 and paid percentage based royalties, under protest, of $2,405,204.14 for that coal. This is $2,226,520.84 more than Western-Utah would have paid ($178,683.30) based on a royalty of 15 cents per ton.

Western-Utah, to protect its rights and following the prescribed procedures, objected to the proposed lease readjustment, claiming it was untimely. Western-Utah objected to the readjustment, first, to the Bureau of Land Management, as required by the lease and the 1983 regulations. The BLM overruled Western-Utah's objection by a decision dated February 7, 1985. Western-Utah then appealed the BLM decision to the IBLA which, on the key matter of allowing the readjustment, affirmed the BLM's decision. 98 IBLA 114 (1987). Both the BLM and IBLA ruled that the bare May 1982 notice was sufficient to readjust the lease in a timely manner, even though that notice did not include the terms of the adjustment. These Interior decisions were upheld by the district court when it granted the government's motion for summary judgment. App. 1-24a. The court of appeals affirmed the judgment of the district court. App. 1-22a.[5]

V. REASONS FOR ALLOWANCE OF THE WRIT

The Court should review the decision of the court below because it continues confusion among the various decisions of the courts of appeals on the readjustment issue and encourages continued imprecision by Interior (administrative sloppiness, not to put too

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[5] Western-Utah's case was consolidated in both the district court and in the court of appeals with related cases brought by Peabody Coal Company and Colowyo Coal Company. Nos. 88-5418 and 88-5419 (D.C. Cir.). The decision below included rulings on issues raised separately by Peabody and Colowyo, including questions on the statutory authority and constitutionality of the Secretary's decision to apply the royalty rates prescribed by section 7 of the MLLA, amended by the Federal Coal Leasing Amendments Act of 1976. 30 U.S.C. § 207 (1986). Western-Utah does not raise these separate Peabody and Colowyo arguments.

fine a point on it) in applying the readjustment authority of section 7 of the MLLA. Further, the propriety of the Secretary's determinations on the multitude of lease readjustments involves questions of applicability of the *Chevron* rule of deference (*Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)) to the Secretary's action, and a difference of potentially hundreds of millions of dollars in federal coal royalties. Finally, the Court should exercise its discretion, and grant certiorari, in order to correct the plain error effected by the decision of the courts below.

A. The Decision of the District of Columbia Circuit Conflicts with an Earlier Decision of the Tenth Circuit.

The decision of the Court of Appeals for the District of Columbia Circuit in *Western-Utah* was the fourth full decision of a federal court of appeals addressing the timeliness of lease readjustments. The three decisions preceding *Western-Utah* came from different panels of the Tenth Circuit. The appeals decisions are inconsistent.

In *Rosebud Coal Sales, Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982), the first of the Tenth Circuit cases, the question was "whether by a notice [of intent to adjust] given about two and one-half years after the anniversary date the Department has authority . . . to readjust a coal lease."[6] The *Rosebud* court found that this belated attempt to readjust was beyond the Secretary of Interior's statutory authority

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[6] The *Rosebud* panel, in a companion case decided the same day, applied *Rosebud's* reasoning to a virtually identical case, with the same result. *California Portland Cement Co. v. Andrus*, 667 F.2d 953 (10th Cir. 1982).

and contrary to the terms of the lease requiring that adjustments be made "at the end of each twenty-year period." Id. at 950-51, 53. In the court's analysis germane to Western-Utah's argument, the *Rosebud* panel reasoned that:

> A time is . . . stated when the Government can "readjust" the royalty and other terms - at the end of each twenty-year period. This provides a right to the Government in the nature of an option to make adjustments it considers necessary or to let the opportunity pass.
>
> * * *
>
> In . . . considering all the contract provisions, and in an application of the ordinary meaning to the terms, it is not difficult to reach the conclusion that *the readjustment was to be when each twenty-year period expired, on that date and not at a later time. The statement of time "at the end of" on its face is not susceptible to any variation as it is a precise time.*

Id. at 951 (emphasis added). The court thus treated the phrase "at the end of" as akin to a statute of limitations. The end of the then current period of the lease is a "precise" deadline for readjustment.

The second Tenth Circuit panel, which decided *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496 (10th Cir. 1987), *cert. den.*, 484 U.S. 1041 (1988) and *Coastal States Energy Co. v. Hodel*, 816 F.2d 502 (10th Cir. 1987) on the same day, did not require nearly as much precision in the timing of adjustments as did the court in *Rosebud*. While several other issues were pre-

sented, on the timeliness question the primary issue in both *FMC* and *Coastal* was whether BLM had to reach and announce a *final* decision on coal lease readjustments by the anniversary date of the leases, or whether it was sufficient for BLM merely to have transmitted a notice of *intent* to readjust (Western-Utah's case) or the actual readjusted terms. While its express "holding" was primarily *dictum* on the adequacy of a bare "notice of an intent to readjust,"[7] the *FMC* court did find (and "so hold") that:

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[7] For most of the leases at issue in *FMC* and *Coastal*, the lessee did receive the actual lease terms prior to the end of the lease period, even if by reason of the administrative appeals process Interior had not yet reached a final decision on the lessees' objections. *FMC* and *Coastal* are thus mostly distinguishable from Western Fuels' situation. Only in the *Coastal States* decision, and for only one of the leases at issue there, did the lessee, like Western-Utah, receive the bare "notice of intent to adjust" prior to the adjustment date without also receiving the actual terms prior to the deadline. Coastal States' facts were not as compelling as Western-Utah's, though, since Coastal States could not argue one of its leases against its second lease also at issue in its case. Coastal States, in other words, could not and did not take the position and argue, as does Western-Utah, that only actual receipt of the lease terms prior to the deadline satisfies the Act, since Coastal *did* receive those actual terms for one of the leases at issue in its case. *See* 816 F.2d at 504.

Western-Utah does not contend that where actual terms and conditions are received by a lessee by the adjustment date but because of administrative appeals its terms and conditions are not formally resolved, the Secretary has thereby failed to meet the statutory deadline. Administrative appeals are not a matter of right. The Secretary could have delegated authority to BLM to make its initial decision final. That the Secretary has chosen to permit administrative appeals does not confer a new right on a lessee.

> [A] notice of intent to readjust terms and conditions of a coal lease given a coal company on or shortly before the 20 year anniversary date preserves the Department's right under MLLA and lease provisions to readjust the terms *within a reasonable time thereafter* . . .

816 F.2d at 500. What is troubling is that the Tenth Circuit panel in *FMC* and *Coastal* opined that this holding was "strongly suggeste[d]" by *Rosebud*. *Id.* at n.8. In fact, as quoted above, the *Rosebud* panel had ruled that "at the end of" bespeaks a "precise time."

Whatever the consistency or inconsistency between *Rosebud* and the later decisions of the Tenth Circuit, the District of Columbia Circuit took a dramatically different tack on the timeliness question than the one espoused in *Rosebud*. Western-Utah argued in its case, based on *Rosebud*, that a readjustment is "not complete until the Secretary sends the lessee the proposed lease terms." The Secretary sent the terms to Western-Utah after the statutory deadline and thus, we claim, waived the 1983 readjustment. The District of Columbia Circuit reasoned, however, that:

> To give the statutory phrase its literal meaning would be to say that the United States waives its ability to readjust a coal lease unless it performs the readjustment on the very day the lease expires, a result Congress could hardly have intended.
>
> The statutory provision that a lease may be readjusted "at the end of" each 20-year period is capable of bearing other interpretations. It could mean, for instance, that

> negotiations concerning the new lease terms should begin on or about the anniversary date of the original lease. It could be intended to govern only the effective date of a readjusted lease, and to impose no requirements as to when the readjusted terms should be determined. In short, we think Congress implicitly delegated to the Secretary the task of determining the timing of the procedures by which he would readjust coal leases. See *Chevron*, 467 U.S. at 843-45, 104 S.Ct. at 2781-83.

895 F.2d at 790, App. 1-20a-21a. The court then deferred to the Secretary's interpretation of the statute.

The District of Columbia Circuit and the various decisions of the Tenth Circuit apply different reasoning and reach conflicting results on the meaning of the phrase "at the end of," as that language appears in the Mineral Lands Leasing Act and the BLM's coal leases. *Rosebud* has not been overruled. The Court should grant certiorari in order to resolve the differences among the courts of appeals and to resolve the internal differences among the decisions of two Tenth Circuit panels.

B. The Question of Proper Lease Readjustments Raises Important Questions of Federal Law As to Application of the Chevron Doctrine.

The government's decisions on the propriety of its Mineral Lands Leasing Act lease readjustments present important questions of federal law. The lower courts, by misapplying *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), have improperly deferred to the Secretary's interpretation of the statute. The Secre-

tary's decisions have resulted, and will likely continue to result, in the unlawful government collection of many millions of dollars in increased royalties.

1. ***The Plain Meaning, Which Finds Support In The Legislative History, Has Been Disregarded.***

As quoted above, the District of Columbia Circuit, in Western-Utah's case, viewed the statutory phrase "at the end of" to be susceptible to different interpretations—"before the end," on the "very day," "on or about" or simply the "effective date." The court thus decided to defer to the Secretary's interpretation of the statute, allowing transmission of the actual lease terms to the lessee within the time specified in BLM's notice of intent to readjust the lease even though that time might be subsequent to the end of the relevant lease period. The court found deference to be proper under the second half of the test in *Chevron*, 467 U.S. 837 at 842-45, ruling that the Secretary's interpretation and procedure were "reasonable."[8]

The propriety of deference to the Secretary here is at the heart of the controversy.

Neither the legislative history nor the structure of the statute itself warrant departing from the plain and ordinary meaning of the readjustment provision in the Act. Nor is the statute ambiguous, the threshold issue that must be resolved before the deference

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[8] The Tenth Circuit panels did not "defer" to the Secretary, at least to the same degree as in *Western-Utah*. The *Rosebud* panel obviously rejected the Secretary's reading of the statute on timeliness, 667 F.2d at 953. although the court in *FMC* deferred to the Secretary's interpretations of the applicable regulations. *See* 816 F.2d at 505 n.5.

principle can properly be invoked. *Chevron*, 467 U.S. at 843.

The obvious common sense meaning of "at the end of" is that Congress intended to give the Secretary the opportunity to mandate new terms and conditions which would take effect with the initiation of the second period of the lease. While Congress could perhaps have chosen more felicitous language, the natural meaning of the provision is plain. The obvious intent is that the lessee was to know what would be demanded of him at the start of the next lease period.

To find that Congress intended, without a word to that effect in the statute, to give the Secretary the right to defer prescription of new terms and conditions until after the ensuing lease period has commenced, is a strained, unnatural reading of "at the end of" in the context of the provision in which it is found.

To be sure, if evidence of Congressional intent can be found, resort can be had thereto for whatever light it may shed. *Train v. Colorado Public Interest Resource Group*, 426 U.S. 1, 10 (1976); *United States v. American Trucking Ass'n. Inc.*, 310 U.S. 534, 543-544 (1940). If the legislative history suggested that Congress had left an area of uncertainty to be filled in by the Secretary, his interpretation would, under *Chevron*, be entitled to deference. But here, the very absence of any such indication in the legislative history, along with the one piece of legislative history that is available, compels the conclusion that Congress meant what it said. *Cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 n.12 (1987).

While there is not a great deal of legislative history shedding light on section 7, such history as exists

strongly suggests that Congress intended that adjustments be completed by the end of the relevant period of the lease.

What became section 7 of the 1920 act first appeared in a 1914 bill dealing with the leasing of Alaskan coal lands. That provision read:

> Leases shall be for indeterminate periods * * * upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods.

H.R. 14223, 63rd Cong., 2nd Sess., § 7 (1914). The report of the House Committee on Public Lands includes the testimony of Interior Secretary Lane. In explaining the above quoted provision, Secretary Lane stated:

> Lessees are are [sic] unwilling to expend the money necessary for the thorough equipment of a large mine under a lease for a short period, therefore, the leases are indeterminate. Conditions, however, may materially change from time to time, and for this reason provision was made for such readjustment of terms and conditions might be made *at the end of 20-year periods as Congress might authorize.*

H. Rep. No. 352, 63rd Cong., 2d. Sess. 10 (1914) (emphasis supplied). No further discussion appears in the legislative history although from that date and forward many of the various bills under consideration,

including the bill that became law in 1920, included the "at the end of" formulation. *See* H.R. 14094, 63rd Cong., 2d. Sess. (1914); H.R. 16136, 63rd Cong., 2d Sess. (1914); H.R. 406, 64th Cong., 1st Sess. (1915); H.R. 3232, 65th Cong., 2d Sess. (1917); S. 4898, 63rd. Cong., 2d Sess. (1914); S. 45, 65th Cong., 1st Sess. (1917); S. 2812, 65th Cong., 1st Sess. (1917); S. 2775, 65th Cong., 1st Sess. (1919).

The objective of encouraging large scale investments to mine coal under federal leases is incompatible with the idea of letting the Secretary pick his own time rather than the time prescribed by the statute to change the lease's terms. In sum, the District of Columbia Circuit has misapplied *Chevron* by manufacturing an ambiguity that permits the Secretary to bootstrap himself into giving himself more jurisdiction than Congress has allowed.

It is also, of course, appropriate to examine the statute as a whole in determining the meaning of a particular provision. *See United States v. Morton*, 467 U.S. 822, 828 (1984). Even a cursory review of the MLLA reveals a plethora of instances in which Congress has clearly, and on the face of the statute, left it to the Secretary to fill in interpretations where Congress itself did not have an actual specific intent. *See Chevron* at 467 U.S. 845.

To cite a few examples from the amended section 7 itself (30 U.S.C. § 207 (1986)), that section, while retaining unchanged the "at the end of" formulation for readjusting terms and conditions, provides, *inter alia*, that the *ad valorem* royalties are to be based on the value of the coal *as defined by regulation*, *see* 30 U.S.C. § 207(a) (1986); a lease shall contain such terms and conditions other than rents and royalties

"as the Secretary shall determine," *id.*; the lease is subject to the conditions of "diligent development and the continued operation," terms which are undefined, 30 U.S.C. § 207(b) (1986); the Secretary "may" "upon determining that the public interest will be served thereby" suspend the diligent development requirement upon payment of advance royalties "*not less than* the production royalty computed on a fixed reserve to production ratio" determined by the Secretary," *id.* (emphasis supplied); the Secretary may approve or disapprove a lessee's plan of reclamation, 30 U.S.C. § 207(c) (1986), but with no standard being enunciated by Congress for his guidance. The Act is replete with other provisions vesting discretion in the Secretary to oversee the highly technical and complex matter of lease operations.

These examples of discretion are in sharp contrast to the clear direction that adjustments are to be made "at the end of" each lease period. The conclusion is inescapable that Congress meant the adjustment provision as a limitation on the Secretary's authority.

Rather than *Chevron*, *Hallstrom v. Tillamook County*, ___ U.S ___ , 110 S. Ct. 304 (Nov. 7, 1989) and *United States v. Locke*, 471 U.S. 84 (1985) should guide the decision here. As here, both *Hallstrom* and *Locke* presented questions of interpretation of Congressionally mandated deadlines. In *Locke* the deadline (involving time for filing by the holder of an unpatented mining claim of a notice of intent to hold the claim) was "prior to December 31" of each year. *Hallstrom* presented the issue of what was meant by a statutory prohibition against bringing a citizens suit "prior to 60 days after" notice of the claimed violation was given to the Environmental Protection

Agency. The claimants in *Hallstrom*, like the Secretary and lower courts here, believed that the statutory deadline "should be given a flexible or pragmatic construction." They argued that "a 60-day stay would serve the same function as delaying commencement of the suit." *Id.* at 309. The Court, while somewhat sympathetic to the procedural dilemma, strictly enforced the statute. A stay in *Hallstrom* would "flatly contradict the language of the statute," *id.*, just as would allowing adjustment of mineral leases here after "the end of" the lease period.

In *Locke* where the notice was filed on December 31 rather than "prior to" that date, it was argued that the phrase should be interpreted to mean "on or before." The Court's comment is apt here:

> It is clear that the plain language of the statute simply cannot sustain the gloss appellees would put on it. . . . While we will not allow a literal reading of a statute to produce a result "demonstrably at odds with the intentions of its drafters," [citation omitted], with respect to filing deadlines a literal reading of Congress' words is generally the only proper reading of those words. . . . Faced with the inherent arbitrariness of filing deadlines, we must, at least in a civil case, apply by its terms the date fixed by statute.

Locke, 471 U.S. at 93-94.

There is no more warrant for reading "at the end of" to mean "after the end of" than there was in *Locke* for reading "prior to December 31" to mean "on or prior to December 31."

2. *A Basic Requirement of Chevron—Consistency of Administrative Interpretation—Is Lacking.*

Even under a statute which is arguably open to interpretation, an agency's interpretation, to merit deference, should be consistent. *See INS v. Cardoza-Fonseca*, 480 U.S. at 446 n.30 (agency interpretations which are inconsistent not entitled to "heightened deference").

As it happens, coal is not the only mineral for which, under the Mineral Lands Leasing Act, leases are of indeterminate length and subject to adjustment of terms and conditions "at the end of" an initial period and "at the end of" prescribed periods thereafter. Such provisions are also applicable to leases for phosphates, 30 U.S.C. § 212 (1986); gilsonite, 30 U.S.C. § 241 (1986) and potassium (potash), 30 U.S.C, § 283 (1986). In the case of phosphate and potash, the Secretary may adjust the terms and conditions "at the end of each 20 year period succeeding the date of the lease unless otherwise provided by law at the end of such periods." This provision is substantially identical to the coal lease provision at issue here. 30 U.S.C. § 207 (1971). In the case of gilsonite, only the royalties are subject to adjustment at the end of each twenty year period.

For all three of these minerals the Secretary's regulation reads:

> *Prior* to the expiration of each 20-year period, the authorized officer *shall* transmit proposed readjusted terms and conditions to the lessee. *If the authorized officer fails to transmit the proposed readjusted terms and conditions prior to the expiration of the 20-*

> *year period, the right to readjust the lease shall have been waived until the expiration of the next 20 year term.*

43 C.F.R. §§ 3511.4(a) (phosphate), 3531.4(a) (potassium), 3551.4(a) (gilsonite) (emphasis added).

In other words, on virtually identical statutory language as coal, the Secretary recognizes that "at the end of" means exactly what it says—the new terms and conditions must be transmitted by to the end of the period or an adjustment does not occur. With the Secretary interpreting "at the end of" one way for coal and another way for phosphate, potassium and gilsonite, there can be no room for deference.

3. *Deference is not Due a Jurisdictional Determination.*

For yet another reason, *Chevron* has been misapplied. The time limit "at the end of" is in essence a jurisdictional boundary beyond which the Secretary may not go. These deadlines are not, as in *Chevron*, questions of the proper implementation of complex and relatively undefined federal programs. Rather, here the issue is whether the Secretary or any other agency ought to be allowed to decide, itself, the boundaries of that same agency's authority. The issue also concerns the justification, if any, for reliance on an agency's interpretation of a contract to which it is itself a party. *See Rosebud*, 667 F.2d at 951 (use "typical contract law doctrines" to determine meaning). These questions have not been squarely and unequivocally answered by this Court. *Compare Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S. Ct. 2428, 2443 (1988) ("rule of deference applies to an agency's interpretation of a statute designed to confine its authority")

(Scalia, J., concurring) *with Mississippi*, 108 S. Ct. at 2446 ("agency deference cases have always been limited to statutes the agency was 'entrusted to administer,' " so deference not appropriate on matters of jurisdiction) (Brennan, J., dissenting, quoting *Chevron*, 467 U.S. at 844). *See also Public Utilities Commission of California v. Federal Energy Regulatory Commission*, ___ F.2d ___, No. 89-1189 (D.C. Cir. April 3, 1990) ("deference may be 'inappropriate' where the agency is interpreting a statute 'delimiting its jurisdiction' ") (quoting *New York Shipping Ass'n v. Federal Maritime Com'n*, 854 F.2d 1338, 1363 (D.C. Cir. 1988)), *cert. den.* ___ U. S. ___, 109 S. Ct. 866 (1989). The Court should review the decision below in order to address the question of deference as applied to matters of agency authority. In this instance, unwarranted deference results in the unlawful collection of millions of dollars in coal royalties.

C. There Is No Policy or Practical Reason Why Literal Compliance with the Statute's Command Cannot be Had.

Neither the Secretary nor his BLM representatives have ever explained the reason for failing to provide the new terms and conditions by the end of the twenty year period. Nor has the Secretary offered a valid administrative excuse in the context of the other court proceedings. In *Rosebud* the Secretary argued that he should have been excused from making timely adjustments because he was "otherwise occupied" on coal policy questions. One assumes that BLM similarly thought other matters more pressing in Western-Utah's case—the government simply could not complete the adjustment before the deadline. The court

in *Rosebud* gave this explanation the negative response it deserved:

> The time for readjustment of coal lease terms comes so infrequently that it must be assumed that timely consideration is given in the ordinary administrative process.

667 F.2d at 952.

And in this age of computerization there can be no excuse for not installing a program which timely brings to the attention of the appropriate BLM office the fact that an adjustment time is approaching.

Perhaps the most deleterious impact of the lower court's decision is that it fosters continuing government laxity in administering the nation's mineral leasing program. The Mineral Leasing Act is *not* a "notice" statute. It says, in so many words, that the Secretary has a right to make "readjustment of terms and conditions" so long as he makes them "at the end" of the lease term. 30 U.S.C. § 207 (1971). This phrase—"at the end"—is *not* reasonably susceptible to various meanings, contrary to the finding of the court below. It sets a *deadline*; it is akin to a statute of limitations.

The Secretary had an option to readjust the terms of Western-Utah's lease, just as he has in fact readjusted dozens and dozens of other leases "at the end" of the initial term. That option to adjust, to be exercised, must meet basic and fair legal standards; it must transmit the basic terms of the new lease. *See e. g. Covey v. Covey's Little America, Inc.*, 378 P.2d 506, 517 (Wyo. 1963) (options "strictly construed"; must be exercised "within a stated time and in a

particular manner").[9] Here the Secretary failed to give timely notice of the proposed terms. The Secretary will doubtless commit similar error with other leases in the future.

CONCLUSION

The Secretary unquestionably needs additional direction on when and how leases are to be readjusted. The Court should grant certiorari in order to resolve an important question of federal law which remains uncertain as a result of the decisions of the courts of appeals.

Respectfully submitted,

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Dated: May 8, 1990

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[9] *See also* American Law Institute, *Restatement (Second) of Contracts*, § 63, Comment f (1981) (option contracts subject to "definite time limit"); Anno., Option in Lease - Timely Notice, 29 ALR 4th 956 ("If a lease specifies that notice is to be given by a particular time in order to exercise an option to renew the right to renew is lost if the notice is not given within the prescribed time"), and cases cited therein.

APPENDIX

APPENDIX 1

United States Court of Appeals,
District of Columbia Circuit.

Nos. 88-5417 through 88-5419.

WESTERN FUELS-UTAH, INC.,

Appellant,

v.

Manuel LUJAN, Jr., Secretary of the United States Department of the Interior,

Appellee.

PEABODY COAL COMPANY, *et al.*,

Appellants,

v.

Manuel LUJAN, Jr., Secretary of the United States Department of the Interior,

Appellee.

COLOWYO COAL COMPANY,

Appellant,

v.

Manuel LUJAN, Jr., Secretary of the United States Department of the Interior,

Appellee.

Argued Dec. 12, 1989.

Decided Feb. 9, 1990.

Appeal from the United States District Court for the District of Columbia (Civil Action Nos. 87-02669, 87-01359 & 87-02325).

John F. Shepherd, Denver, Colo., with whom Kenneth D. Hubbard, Washington, D.C., for Peabody Coal Co., et al., Charles L. Kaiser, Denver, Colo., and Thomas P. Humphrey, Washington, D.C., for Colowyo Coal Co. were on the joint brief for appellants, in Nos. 88-5418 and 88-5419.

Charles F. Holum, Denver, Colo., with whom Edward Weinberg, Washington, D.C., was on the brief for appellant, Western Fuels-Utah, Inc. in No. 88-5417.

Jean A. Kingrey, Atty., Dept. of Justice, with whom Richard B. Stewart, Asst. Atty. Gen. and Robert L. Klarquist, Atty., Dept. of Justice, Washington, D.C., were on the brief for appellee in all cases.

William L. Slover and John H. LeSeur for City of Colorado Springs, Colo., and Central Power & Light Co., Kenneth G. Lee, Washington, D.C., for Colorado-Ute Electric Ass'n, Inc., were on the joint brief for amici curiae urging reversal in all cases.

John R. McNeill and J. David Reed, Montrose, Colo., also entered appearances for amici curiae, Colorado-Ute Elec. Ass'n, Inc., in No. 88-5419.

Before WALD, Chief Judge, and EDWARDS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

The appellants in these consolidated cases hold leases granting them the right to mine coal on federal land. They seek review of the district court's decision upholding the Bureau of Land Management's ("BLM") readjustments of their leases. The appellants challenge first the BLM's de-

cision that it was compelled to apply the Federal Coal Leasing Amendments Act of 1976 ("FCLAA") to their leases, even though the leases were issued before 1976, and claim further that if the BLM had correctly interpreted FCLAA to apply to their leases, then the statute is unconstitutional. The appellants also challenge the timeliness of the lease readjustments. We affirm the district court's judgment sustaining the lease readjustments against all of these claims.

I. Background

The Mineral Lands Leasing Act of 1920 ("MLLA"), 41 Stat. 437 (1920) (codified as amended at 30 U.S.C. §§ 181-287), authorized the Secretary of the Interior to lease federal lands for coal production. The Act dictated certain mandatory provisions to be included in the leases it authorized; in particular, it required that each lease provide for payment by the lessee of a royalty for not less than five cents per ton of coal extracted. §7, 41 Stat. at 439. The Act provided that the term of a coal mining lease would be indeterminate, upon condition of diligent development and continued operation of the mine, and upon the further condition that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods." *Id.*

In 1976, Congress enacted the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083 (1976) (codified as amended at scattered sections of 30 U.S.C.). Among the several concerns that led Congress to amend the MLLA was the low royalty lessees were paying for publicly owned coal. *See* H.R.Rep. No. 681, 94th Cong., 2d Sess. 17, *reprinted in* 1976 U.S.Code Cong. & Admin.News 1943, 1953 [hereinafter 1976 House Report] ("the public is being paid a pittance for its coal resources"). Accordingly, Congress amended § 7 of the MLLA, 30 U.S.C. § 207, to provide:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from the lease. . . . A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

The appellants, Peabody Coal Company ("Peabody"), Colowyo Coal Company ("Colowyo"), and Western Fuels-Utah, Inc. ("Western Fuels"), are holders of federal coal leases issued before 1976. Each lease, in accordance with the MLLA, contained a clause reserving to the lessor a right of readjustment at twenty-year intervals. These clauses did not precisely track the words of the statute; they provided that the lessor reserved:

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

See Joint Appendix ("J.A.") 12, 36, 41, 75, 203.[1]

[1] One of the leases at issue contained slightly different wording. It provided:

> It is mutually understood and agreed that the lessor shall have

As the leases came due for their twenty-year readjustments after 1976, the Secretary, acting through the BLM, readjusted them to provide for payment of the 12.5% royalty fixed in § 207 (except in the case of Western Fuels' lease, for which a lower royalty was fixed because Western Fuels engages in underground mining), and also to provide that their subsequent readjustments would take place at ten-year intervals. The BLM expressly stated at the time of these readjustments and continues to maintain on this appeal) that is used the 12.5% royalty figure because § 207 required it to do so. *See, e.g.*, J.A. 26; Brief for Appellee at 21-22. The lessees, except Western Fuels, objected to the 12.5% royalty, but the BLM overruled these objections.

The lessees also objected to the timeliness of the procedure by which the BLM readjusted their leases. At the time of the lease readjustments in question, the BLM used a four-step process to readjust coal leases. The first step was that the BLM sent the lessee a Notice of Intent to Readjust the Lease ("NIRL").[2] This notice, a one-page letter, stated the date on which the lease became subject to readjustment; it also stated that the lease would be readjusted, and that the readjusted terms and conditions would be sent to the lessee within two years of the date of the NIRL. *See, e.g.*, J.A. 49. The second step was that the BLM sent the lessee the proposed readjusted terms and conditions of the lease. The third step was that the lessee could file objections to the proposed terms with the

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> the right to readjust and fix the royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof, and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

J.A. 165.

[2] The terms used here to describe the steps in the BLM's procedure are not standardized BLM terms, but are simply used for clarity.

BLM. The last step was the BLM's ruling on the lessee's objections and imposition of the readjusted lease.

In all of the lease readjustments at issue, the BLM sent the lessee a NIRL prior to the lease's twenty-year anniversary date. The lease readjustment process, however, was not completed before the anniversary date in all of the cases. In the case of Western Fuels' lease, the BLM did not send the proposed readjusted terms until after the anniversary date. In all of the other cases, the BLM sent the NIRL and the proposed readjusted terms before the anniversary date, but with regard to some of the leases, the BLM did not rule on the lessee's objections to the proposed readjusted terms until after the anniversary date. In all the cases, the BLM sent the proposed readjusted terms within the period specified in the NIRL.

The lessees all appealed their readjustments within the Department of the Interior to the Interior Board of Land Appeals ("IBLA"), which upheld the mandatory application of § 207 to pre-1976 leases,[3] and found the lease readjustments to be timely. The lessees sought review of the IBLA decisions in district court, which consolidated the cases and granted the Secretary's motion for summary judgment in all of them. The lessees then brought the instant appeals.

II. The Applicability of Section 207 to Pre-1976 Leases

In deciding whether to uphold the BLM's decision to apply § 207 to pre-1976 leases, we begin by identifying the precise question at issue, and determining whether Congress has directly spoken to that question. If the intent of Congress with respect to the precise question at issue is clear, we must give it effect. *Chevron, U.S.A., Inc. v.*

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[3] The term "pre-1976" is used throughout this opinion as shorthand for "prior to August 4, 1976," the effective date of FCLAA.

NRDC, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). In determining the intent of Congress, we must look to "the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988), and we must employ traditional tools of statutory construction, including, where appropriate, legislative history. *Ohio v. United States Department of the Interior*, 880 F.2d 432, 441 (D.C.Cir.1989).

In the present cases, the question at issue is whether the mandatory lease terms provided in § 207 apply to pre-1976 leases when they come up for adjustment after 1976. The text of § 207 itself does not clearly answer that question. As amended by FCLAA, 30 U.S.C. § 207 now provides in mandatory terms for a 12.5% royalty on coal leases. It does not, however, expressly provide that this royalty shall be imposed on pre-1976 leases; nor, on the other hand, does it expressly grandfather such leases from the imposition of this royalty.

The appellants claim that the absence of an express reference to pre-1976 leases in § 207 implies that such leases are exempt from the section's new, mandatory lease terms. The appellants observe that in other places, FCLAA makes express reference to pre-1976 leases, thereby suggesting that Congress knows how to refer to such leases when it wants to affect them. However, one might equally well observe that when Congress wants to exempt existing arrangements from new statutory requirements, it knows how to include a grandfather clause. Indeed, one of FCLAA's express references to pre-1976 leases is in the nature of an exemption of such leases from certain of FCLAA's new, more exacting requirements.[4] If we were

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[4] The reference is in § 3 of FCLAA, 30 U.S.C. § 201(a)(2)(A). This section was the result of the 1976 Congress' displeasure with federal

to draw any inference from this explicit reference, it would be that in the absence of such a reference in § 207, pre-1976 leases are not exempted from that section's requirements.

The government, by contrast, notes that FCLAA superseded that part of the MLLA that specified the mandatory royalty provisions of pre-1976 leases; the earlier royalty provision is no longer in the Act. Therefore, if the mandatory terms of FCLAA do not apply to pre-1976 leases, such leases would be subject to *no* mandatory royalty at all upon readjustment. Hence, the government concludes, the absence of any special reference to pre-1976 leases in FCLAA implies that the new terms of FCLAA must apply to them. This argument, too, is not preemptive; Congress could simply have trusted the Secretary to determine an appropriate royalty for pre-1976 leases without the guidance of a statutory minimum, just as there now is apparently no statutory minimum royalty for coal recovered by underground mining operations. The absence of a specific reference to pre-1976 leases in the new § 207 does not definitively decide the issue.

The appellants also observe that the new § 207 speaks of the "primary term of twenty years" of a coal lease. Pre-1976 leases, the appellants correctly observe, have no primary term, but are indefinite. However, we do not conclude from this that § 207 cannot apply to pre-1976 leases. As we shall see below,[5] Congress sometimes uses the word "term" to refer to the first twenty-year period in the life

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coal lessees who were not mining coal, but who were holding onto coal leases for speculative purposes. *See* 1976 House Report at 14-15, 1976 U.S.Code Cong. & Admin.News at 1950-51. The section provides that the Secretary shall not issue a coal lease to any person who already holds one but who has not produced coal under that lease for a period of ten years. The section also provides, however, that in computing the ten-year period, the Secretary shall not count time prior to August 4, 1976.

[5] *See infra* note 7 and accompanying text.

of a pre-1976 coal lease, even though, technically speaking, such leases are for an indefinite term. We think the phrase "primary term of twenty years" simply means the twenty-year period before a coal lease first becomes subject to readjustment, whether the lease was issued before or after 1976. Ultimately, therefore, the text of § 207 does not unambiguously answer the question of whether Congress intended FCLAA's new mandatory lease terms to apply to pre-1976 leases.

This is not, however, the end of the initial *Chevron* inquiry; we now turn to "the language and design of the statute as a whole," *see K Mart*, 108 S.Ct. at 1817, to determine whether Congress expressed its intent on the question at issue. Looking outside § 207 to other sections of the statute, we find convincing evidence of § 207's scope.

30 U.S.C. § 203 allows holders of coal leases to modify their leases by adding contiguous or cornering lands to them. Such a modification creates a new lease, and if all lands covered by the new lease were immediately subject to the royalty provision of § 207, holders of pre-1976 leases would be understandably reluctant to add land to their leases. Section 203 therefore provides

> The minimum royalty provisions of section 207(a) of this title shall not apply to any lands covered by this modified lease prior to a modification until the term of the original lease or extension thereof which became effective prior to the effective date of this Act has expired.[6]

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[6] This sentence was not added to § 203 until 1978. *See* 92 Stat. 2073, 2074 (1978). It is, however, now a part of the "statute as a whole" that we must interpret. We of course bear in mind "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 117, 100 S.Ct. 2051, 2060, 64 L.Ed.2d 766 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 331-32, 4 L.Ed.2d 334 (1960)). As *CPSC v.*

We find it impossible to make sense out of § 203 unless § 207 applies to pre-1976 leases. The quoted sentence clearly suggests that § 207's royalty provision will become applicable to all the lands in a modified lease at some time after the modification. The sentence must refer to a lease originally issued before 1976 but modified thereafter, for if a lease was originally issued after 1976, § 207 immediately applied to all of it. In providing that § 207 would apply to the lands covered by the original lease only after the original term or an extension thereof expires, § 203 necessarily assumes the application of § 207 to the pre-1976 lease at the readjustment date. Section 203 thus shows that the new mandatory lease terms apply to lands covered by a pre-1976 lease upon readjustment.[7]

The legislative history of § 203 confirms this reading.[8] The Senate Report states, "[a]ll leases would of course be

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GTE Sylvania explains, however, there is an important distinction between subsequent *legislation* and less formal types of subsequent legislative history. *Id.* at 118 n. 13, 100 S.Ct. at 2061 n. 13. It is proper for us to consider the new text of § 203 in our attempts to discern the meaning of the 1976 amendment to § 207; indeed, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Id.* (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801-02, 23 L.Ed.2d 371 (1969)).

[7] The section also shows that Congress on occasion referred to the first twenty-year period in the life of pre-1976 coal lease as the "term" of that lease. As noted earlier, the term of a pre-1976 lease is, technically, indeterminate. But the word "term" cannot have that meaning in the quoted sentence from § 203, because if it did, the section's statement that § 207 does not apply "until the term of the original lease . . . has expired" would be tantamount to saying that § 207 would never apply, an interpretation of § 203 that would be absurd to impute to Congress. Nor would it make sense to speak of an "extension" of the original lease, as section § 203 does, if the original lease term were indeterminate. Section 203 therefore confirms our reading of the phrase "primary term of twenty years" in § 207 as applying to pre-1976 leases.

[8] In keeping with *CPSC v. GTE Sylvania*, *see supra*, we have not given great weight to the legislative reports and floor statements ac-

subject to the provisions of the 1976 amendments at the expiration of their original lease term. [Section 203] does not affect this eventuality in any way." S.Rep. No. 1169, 95th Cong., 2d Sess. 7 (1978), 1978 U.S.Code Cong. & Admin.News 4736, 4740. Senator Melcher, a member of the Senate subcommittee responsible for the 1978 amendment to § 203, stated during the debates on the bill that "[t]he effect of the bill passed in 1976 was that, as [outstanding coal] leases became renewable at the end of 20 years, the terms of the lease would be changed to 12.5 percent royalty." 124 Cong.Rec. 30,369 (1978). Senator Haskell, chairman of the subcommittee, agreed. *Id.* Section 203 thus provides conclusive support for the Secretary's interpretation of § 207.

The appellants argue that when Congress was considering the 1978 amendment to § 203, it considered and rejected a floor amendment that would have amended the MLLA to provide expressly that pre-1976 leases would be subject to FCLAA's mandatory royalty rates upon readjustment. From the failure of Congress to enact this amendment, the appellants would have us conclude that Congress is at odds with the Secretary's interpretation of FCLAA. However, we are not convinced. In the first place, we think the appellants have misapprehended the purpose of the proposed amendment. It principally concerned those pre-1976 leases that had come due for readjustment but that the Secretary had for some reason failed to readjust. The proposed amendment would have automatically subjected such leases to the 12.5% royalty. *See* 124 Cong.Rec. 30,369. The failure of Congress to impose the 12.5% royalty on leases for which readjustment had been waived does not establish any intent as to what the Secretary

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companying the 1978 amendment to § 203. They merely confirm what the text of § 203 makes clear. *But see Bell v. New Jersey*, 461 U.S. 773, 784-86, 103 S.Ct. 2187, 2193-95, 76 L.Ed.2d 312 (1983) (giving "persuasive value," while interpreting a statute, to floor statements made during passage of a later amendment).

must do when he actually readjusted a lease; at most it suggests a reluctance to impose new terms on a lease once the time for readjustment has passed.

Moreover, even if the appellants were correct in saying that the purpose of the proposed amendment to the 1978 act was to codify the interpretation of FCLAA that the Secretary now espouses, its failure of passage does not mean that the Secretary's interpretation is wrong. The inference is just as natural that Congress believed the amendment was unnecessary because it simply restated existing law.[9] Drawing inferences from the failure of Congress to enact proposed legislation requires caution, *see, e.g., Advanced Micro Devices v. Civil Aeronautics Board*, 742 F.2d 1520, 1541-42 (D.C.Cir.1984), and we should certainly not give more weight to the failure of Congress to enact the floor amendment than to the bill that Congress did enact, which, as discussed earlier, clearly shows that the Secretary's interpretation of § 207 is correct.

The appellants also argue that the 1976 FCLAA must be read in light of the history of federal coal leasing since 1920, and that the 1976 Congress must be presumed not to have intended to change the scheme of long-term lease

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[9] Indeed, a fuller history of the proposed floor amendment supports this probability. The Senate adopted the amendment and passed the bill as amended. 124 Cong.Rec. 30,372. The House passed a bill that was substantially identical to the Senate bill, except that (1) it treated differently the Secretary's authority to acquire existing leases by giving the lessees other lands in exchange, and (2) it did not contain the amendment adopted on the Senate floor. *See id.* at 33,281-82. The debate in the House focused on the exchange authority issue and did not even mention the Senate's floor amendment. *Id.* at 33,282-86. The Senate concurred in the House bill, after one Senator had discussed the difference in the two versions with regard to the Secretary's exchange authority, but without any discussion of the absence of the Senate's floor amendment. *Id.* at 36,703. It is thus quite likely that the failure to enact the Senate's floor amendment meant only that the Senate saw no purpose in taking on the House over a provision that simply restated existing law.

stability created by the 1920 Congress.[10] The 1920 Congress, appellants argue, knew that coal mining requires large capital expenditures that a mining company would not be willing to make if it could obtain fixed lease terms for only twenty years, and so it created the indeterminate lease. However, even assuming, without deciding, that the 1976 Congress did not intend to break promises of stability made by the 1920 Congress, we find no evidence that the 1920 Congress made any promise that would preclude a later Congress from regulating the royalty for coal leases.

The 1920 MLLA provided that "at the end of each twenty-year period succeeding the date of [a coal] lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods." 41 Stat. at 439. The Act put no upper limit on the royalty rate the Secretary might set upon readjustment; hence, even without FCLAA the Secretary would have had the power (though not the obligation) to fix a rate of 12.5%. It is clear, therefore, that Congress never promised that coal lessees would not be subject to such a rate.

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[10] Indeed, appellants go further: they believe that the intent of the 1920 Congress should control the decision in this case. At oral argument, appellants made the surprising claim that the 1976 Congress could not impose a uniform 12.5% royalty on pre-1976 leases, even by express language in FCLAA, because to do so would be inconsistent with the intent of the 1920 Congress. We disagree with this argument. It is elementary that, within consititutional limits, a later act of Congress can alter rights granted under previous acts. If the 1976 Congress wished to dictate a 12.5% royalty rate for pre-1976 coal leases, only a constitutional bar could stop it from doing so. While we believe the federal coal leasing system created by the 1920 Congress is relevant insofar as it sheds light on what later Congresses were trying to do when they amended the MLLA, it is the intent of those later Congresses that must control our decision, unless implementation of that intent infringes constitutional rights.

The appellants argue, however, that although under the 1920 Act the Secretary could choose such a rate, and subsequent Congress could not direct the Secretary's choice by law. Drawing on excerpts from the legislative history of the 1920 Act, the appellants claim that Congress decided permanently to lodge the authority to readjust royalty rates in the Secretary. The history cited by the appellants, however, shows no more than that Congress, in 1920, was faced with the ordinary choice between dictating certain rates by statute and leaving them to the discretion of an administrative official.[11] Congress delegated authority, within certain limits, to the Secretary, but retained, as usual, the power to circumscribe the Secretary's authority further at a later date. This is made doubly clear by the express provision in the 1920 Act that readjustments shall be as the Secretary may determine "unless otherwise provided by law," which brings us back full circle to the initial inquiry of what, if anything, the current law does provide as to pre-1976 leases. We see no reason, certainly, to think that the 1976 Congress felt any constraint against fixing a royalty rate of 12.5% for readjusted pre-1976 leases.

Finally, the appellants argue that it is not reasonable to conclude that Congress left the Secretary no discretion to impose a royalty rate of less than 12.5% on pre-1976 leases, because the 12.5% rate is simply too high in many cases. In this argument the appellants are joined by several

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[11] The appellants note, for instance, that after voting against a proposal that would have laid down in the statute the royalty rates to be paid for the first 35 years of coal lease and provided that the rates would thereafter be "as Congress may provide," one Congressman stated that coal mining was such an uncertain business that the best way to meet all possible contingencies was to leave the rates to the discretion of the Secretary. 51 Cong.Rec. 15,277-78 (1914). This statement simply reflects the uncertainty about dictating specifics that Congress felt in 1920. It hardly suggests a permanent abdication of Congress' power in the future to limit the Secretary's discretion.

amici curiae, who argue that the increased royalty rates will ultimately be borne by consumers of coal-generated power, and that the increase will be devastating and unfair to those power companies that built coal-fired generating facilities at great expense during the 1970's in response to the United States government's efforts to reduce the nation's dependency on foreign oil. The legislative history of FCLAA shows, however, that Congress was aware of this danger. Several members of the House Committee on Interior and Insular Affairs specifically warned the Congress that 12.5% was too high a figure, and that its imposition would result in higher consumer costs. *See* 1976 House Report at 57-58, 1976 U.S. Code Cong. & Admin.News at 1981. Congress passed FCLAA anyway, and it is therefore not unreasonable to attribute to Congress a desire to impose the 12.5% royalty rate despite its likely effect on fuel costs.

In sum, we think § 203 clearly demonstrates that Congress intended § 207's 12.5% royalty rate to apply to pre-1976 leases as they come up for readjustment.[12] Accordingly, we uphold the Secretary's determination that he is bound to apply § 207's mandatory lease terms to pre-1976 leases.[13]

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[12] The parties put forward, in addition to the evidence discussed so far, other excerpts from the legislative history of the 1976 FCLAA. We have carefully considered these references, but although some of them are suggestive, none provides any clear indication of the congressional intent as to the question in issue.

[13] Our holding makes it unnecessary for us to comment on the appellants' argument that it would be inappropriate to defer to the Secretary's interpretation of § 207 because he is a party to the lease contracts at issue. Also, since we agree with the Secretary that he was compelled to apply § 207's 12.5% rate, we need not decide whether the doctrine of *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943), would require reversal if we found the Secretary's action to be permissible but not compelled. *See Prill v. NLRB*, 755 F.2d 941 (D.C.Cir.), *cert. denied*, 474 U.S. 948, 106 S.Ct. 313, 88

III. The Constitutionality of the Lease Readjustments

A. *Takings Clause*

Appellants contend that if § 207 does, in fact, require the Secretary to readjust their leases for a 12.5% percent royalty, then the Act unconstitutionally takes their property without just compensation. Alternately, they say, the possibility that the Secretary's construction of the Act may operate unconstitutionally on pre-1976 leases should militate in favor of a construction that avoids constitutional risk. We conclude that § 207, as applied to the leases before us, does not violate the Constitution.

The Fifth Amendment to the Constitution provides that private property shall not be taken for public use without just compensation. The appellants claim that the Secretary's decision to impose a 12.5% royalty on all leases substantially interferes with their investment-backed expectation in an individualized determination by the Secretary on the proper royalty adjustment for each lease; the new royalty therefore amounts to an unconstitutional taking of property. Brief for Appellants Peabody and Colowyo at 41-42 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). While the appellants concede that their leases provide for readjustment at twenty-year intervals, they stress that most of the leases in question provide for *reasonable* readjustment. Such readjustments, they claim, can only be accomplished by individualized consideration of the particular circumstances surrounding each lease.

Most of the leases at issue provide that the lessor reserves

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at

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L.Ed.2d 294 (1985) (agency action cannot be upheld if it was based on mistaken belief that it was compelled by statute).

> the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

The constitutional question is whether this clause provides the lessees with rights that can be considered "property" subject to the protections of the Takings clause.

The readjustment clause ends with the phrase "unless otherwise provided by law at the time of the expiration of any such period." It is not immediately clear which part of the readjustment clause this phrase modifies. It might, on the other hand, modify only the phrase "and thereafter at the end of each succeeding 20-year period during the continuance of this lease," meaning that lease readjustments would take place every twenty years, unless Congress by law required them to take place at some other interval. It might, on the other hand, modify the whole of the clause that precedes it, which would presumably mean that the lessor reserves the right to readjust the lease, except that Congress may provide by law that there shall be no readjustment. It might modify the phrase "reasonably to readjust," and thus mean that the lessor reserves the right reasonably to readjust the lease, except that Congress may provide by law for a specific readjustment of its choosing, even one that would have been unreasonable for the Secretary to make on his own under the prior law.

In choosing among the possible meanings of the readjustment clauses before us, we think the crucial point is that some of the constructions would immunize the leases from the sovereign power of the United States to change its laws. Such constructions are highly disfavored. The Supreme Court recently reminded us that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts

subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 106 S.Ct. 2390, 2396-97, 91 L.Ed.2d 35 (1986). The Court stated that the federal government has the duty to honor contracts that confer vests rights on private parties, but observed that "contractual arrangements, including those to which a sovereign itself is party, remain subject to subsequent legislation by the sovereign," *id.* at 52, 106 S.Ct. at 2396-97 (internal quotation omitted), and that "contracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority," *id.* at 52-53, 106 S.Ct. at 2396-97. *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-48, 102 S.Ct. 894, 905-07, 71 L.Ed.2d 21 (1982) (contract granting private party power to extract oil and gas from tribal land should not be construed to abrogate the tribe's sovereign power to impose a severance tax on extractions).

Applying this rule of construction to the lease contracts before us, we conclude that the leases reserve to Congress the power to provide by law for a specific readjustment.[14] The phrase "unless otherwise provided by law at the time of the expiration of any such period," though susceptible of multiple interpretations, is certainly susceptible of this one, which has the indisputable advantage of not foreclosing the exercise of sovereign authority. The leases here do not represent a surrender "in unmistakable terms" of Congress' power to change the law of federal coal leasing. Accordingly, we find that the pre-1976 leases did not give the lessees a vested right to reasonable readjustments by the Secretary on an individualized basis indefinitely into the future. A congressionally-mandated readjustment at the end of a twenty-year period therefore does not rep-

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[14] This conclusion applies *a fortiori* to the one lease at issue for which the readjustment clause does not contain the word "reasonably." *See supra* note 1.

resent a taking of property in violation of the Takings Clause.

The lessees suggest that it would be inappropriate for this court, in construing the lease contracts, to defer to the interpretation of the readjustment clause suggested by the government, because it would, according to them, violate fundamental principles of contract law to let one party to a contract dictate its interpretation. We emphasize, therefore, that in construing the lease contracts we are *not* deferring to the BLM's interpretation. We are, rather, applying the rule of construction laid down by the Supreme Court, that one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms. We have no occasion in these cases to comment on whether it would be appropriate to defer to the government's interpretation of a contract between it and a private party, where the question of interpretation did not involve the limiting of the government's sovereign authority.

B. *Due Process*

The appellants also claim that the imposition of a 12.5% royalty violates Due Process, on the ground that Congress had no basis on which it could find such a rate to be reasonable, as purportedly required by the leases. The appellants note that a congressional commission recently concluded that 12.5% is an excessive royalty rate for coal leases. Brief for Appellants Peabody and Colowyo at 40-41. This claim is meritless. Given our conclusion that Congress had the power to provide by law for such lease readjustments as it saw fit, we cannot strike down Congress' choice of a 12.5% rate simply because we might think it unwise or improvident. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

IV. The Timeliness of the Lease Readjustments

The MLLA and the leases in question provide that the leases may be readjusted "at the end" of each twenty-year period following their issuance. According to the appellants, the United States waives the right to readjust a lease unless it completes the readjustment prior to the anniversary date of the issuance of the lease. Appellants Peabody and Colowyo argue that a readjustment is not complete until the Secretary rules on the lessee's objections to proposed lease terms; appellant Western Fuels argues that a readjustment is certainly not complete until the Secretary sends the lessee the proposed lease terms. The Secretary argues that he may complete readjustment of a lease after the anniversary date provided he sends the lessee a Notice of Intent to Readjust the Lease ("NIRL") prior to the anniversary date, and sends the readjusted terms within the time specified in the NIRL.

Chevron again controls our decision. We conclude without difficulty that the Act does not clearly address the question of precisely when the Secretary must perform a lease readjustment. The appellants argue that "at the end" is a precise term and must be given its precise meaning. Brief for Appellant Western Fuels at 11. Their argument in essence is that the phrase "at the end" means "before the end." They offer no persuasive reason, however, why it should have that meaning, and they certainly do not convince us that it must have that meaning. To give the statutory phrase its literal meaning would be to say that the United States waives its ability to readjust a coal lease unless it performs the readjustment on the very day the lease expires, a result Congress could hardly have intended.

The statutory provision that a lease may be readjusted "at the end" of each 20-year period is capable of bearing other interpretations. It could mean, for instance, that

negotiations concerning the new lease terms should begin on or about the anniversary date of the original lease. It could be intended to govern only the effective date of a readjusted lease, and to impose no requirements as to when the readjusted terms should be determined. In short, we think Congress implicitly delegated to the Secretary the task of determining the timing of the procedures by which he would readjust coal leases. *See Chevron*, 467 U.S. at 843-45, 104 S.Ct. at 2781-83.

We therefore inquire whether the Secretary's interpretation of the statute is reasonable and consistent with the statute's purpose. *See id.* We conclude that it is. The Secretary's procedure of sending a NIRL prior to the lease's anniversary date, and the proposed terms within a time specified in the NIRL, provides the lessee with what it legitimately needs: a date by which it can tell whether its lease will be readjusted. No lessee before us can claim that it was unfairly surprised by the lease readjustment, or that it took action in reliance on the legitimate belief that its lease would not be readjusted. We therefore conclude that the Secretary's procedure satisfied the timeliness requirements of the statute.[15]

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[15] In his brief, the Secretary states that for a lease readjustment to be timely, the BLM need only send a NIRL prior to the lease's anniversary date, and later transmit the proposed lease terms within the time specified in the NIRL. Brief for Appellee at 22-23. There is some question as to whether this is indeed the interpretation of the statute embodied in the Secretary's own readjustment regulations in force at the time of the readjustments at issue. One section of those regulations at least suggests that the proposed lease terms must be sent before the anniversary date. *See* 43 C.F.R. § 3451.1(c)(1) (1983). However, no party before this court has raised an issue as to the meaning of the regulations.

Appellant Western Fuels argues that its lease readjustment did not conform to an internal policy, adopted by the BLM in late 1984, of sending the notice of proposed lease terms at least six months before the anniversary date of a lease. However, even assuming that the

V. Conclusion

For the foregoing reasons, we find no infirmity in the BLM's readjustments of the appellants' coal mining leases. The judgment of the district court is accordingly

Affirmed.

Department's internal decision was the sort of mandatory agency policy upon which the public is entitled to rely, *see, e.g., Doe v. Hampton*, 566 F.2d 265, 281 (D.C.Cir.1977), it was not adopted until well after the time appellant's lease was readjusted.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1359 (TPJ)

PEABODY COAL COMPANY AND
MATERIAL SERVICE CORPORATION,

Plaintiffs,

v.

DONALD P. HODEL, Secretary of
the U.S. Department of Interior,

Defendant

Civil Action No. 87-2325 (TPJ)

COLOWYO COAL COMPANY,

Plaintiff,

v.

ROBERT R. BURFORD, Director of
the Bureau of Land Management,
U.S. Department of Interior,

Defendant

Civil Action No. 87-2669 (TPJ)

WESTERN FUELS-UTAH, INC.,

Plaintiff,

v.

DONALD P. HODEL, Secretary of the
U.S. Department of Interior,

Defendant

FILED

OCT 11 1988

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

Upon consideration of the cross-motions of the several plaintiff-coal companies and the defendant Secretary of the Interior for summary judgment in these consolidated cases, it appearing that the cases are substantially identical to two cases decided the same date by the United States Court of Appeals for the Tenth Circuit, *FMC Wyoming Corporation* v. *Hodel*, 816 F.2d 496 (10th Cir. 1987) and *Coastal States Energy Company* v. *Hodel*, 816 F.2d 502 (10th Cir. 1987), and no sufficient reason having been shown this Court why it should depart from the Tenth Circuit's rulings therein, for essentially the reason set forth by the Tenth Circuit in the cases aforesaid, it is, this 11th day of October, 1988,

ORDERED, that the motions of plaintiffs Peabody Coal Company, et al. (Civ. No. 87-1359), Colowyo Coal Company (Civ. No. 87-2325) and Western Fuels-Utah, Inc., (Civ. No. 87-2669), for summary judgment are denied; and it is

FURTHER ORDERED, that the motions of the defendant Secretary of the Interior for summary judgment are granted, and the complaints are dismissed with prejudice.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
U.S. District Judge